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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY MEJIA PEREZ, Defendant and Appellant.	E065986 (Super.Ct.No. RIF1207791) OPINION

APPEAL from the Superior Court of Riverside County. Becky Dugan, Judge. Affirmed.

Mark D. Johnson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Melissa Mandel, Theodore M. Cropley and Ryan H. Peeck, Deputy Attorneys General, for Plaintiff and Respondent.

On November 4, 2014, the voters approved the Safe Neighborhoods and Schools Act (Proposition 47), which allows a person convicted of a felony prior to its passage, who would have been guilty of a misdemeanor under Proposition 47, to petition the court to reduce his or her felony conviction to a misdemeanor and be resentenced. The proposition created Penal Code section 1170.18[1, 2] which sets forth the guidelines for filing such a petition.

In 2009, defendant and appellant Anthony Mejia Perez entered a plea of guilty to three felonies: second degree burglary, making terrorist threats and stalking. He also admitted that he had suffered five prior convictions for which he served a prison term within the meaning of section 667.5, subdivision (b).

In 2015, he filed a petition to recall his sentence on the three felonies. That petition was denied. In a separate proceeding, defendant had two of the felonies used to enhance his sentence under section 667.5, subdivision (b) in this case reduced to misdemeanors. Defendant filed a second petition to recall his sentence (Petition) in which he claimed since the two prior convictions were no longer felonies, they could not be used to enhance his sentence. He requested a two-year reduction of his sentence. The Petition was denied.

Defendant appeals the trial court's denial of his Petition. He claims the trial court misunderstood the Petition and did not properly exercise its discretion by only addressing

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] References to section 1170.18 are to former section 1170.18, effective November 5, 2014, to December 31, 2016.

whether his three felonies qualified under section 1170.18 and not his prior convictions. In addition, as a matter of law, the trial court had to strike the two one-year sentences on his section 667.5, subdivision (b) prior convictions because he insists that under Proposition 47, once his prior felony convictions were reduced to misdemeanors, the convictions could no longer be used to enhance his sentence in this case. To conclude otherwise would violate his equal protection rights. The California Supreme Court is currently considering these issues. (See *People v. Valenzuela* (2016) 244 Cal.App.4th 692, review granted Mar. 30, 2016, S232900.)

Here, as a matter of law, defendant's previously-imposed sentence, enhanced by the two section 667.5, subdivision (b) prior prison enhancements, is not affected due to the prior convictions subsequently being reduced to misdemeanors under Proposition 47. Proposition 47 was not intended to apply retroactively to enhancements on convictions for which the sentence has been imposed and the judgment is final. Remand is not necessary as he was not entitled to resentencing.

FACTUAL AND PROCEDURAL HISTORY

On October 25, 2012, defendant entered into a negotiated plea in Riverside County case No. RIF1207791. He pleaded guilty to three felonies of stalking (§ 646.9, subd. (a)); second degree burglary, a vehicle burglary (§ 459); and making terrorist threats (§ 422).[3] He also admitted having suffered five prior felony convictions for which he served a prior prison term (§ 667.5, subd. (b)). Two of the section 667.5, subdivision (b) priors (case

[3] The facts of these cases are not relevant to the issues raised on appeal.

Nos. RIF10000131, RIF115955) were for violating section 666, petty theft with a prior.[4] Defendant was sentenced to eight years in state prison.

On July 21, 2015, defendant filed a petition to recall his sentence arguing that his conviction of second degree burglary should be reduced to misdemeanor shoplifting. The petition was denied on January 4, 2016. The trial court found that defendant's burglary conviction did not qualify because he did not establish the burglary was of a commercial establishment. In addition, the trial court found that his stalking conviction did not qualify for resentencing under Proposition 47. Defendant did not appeal the denial of this first petition.

In addition, defendant filed petitions to recall his sentence in case Nos. RIF1000131 and RIF115955 seeking to reduce the felony convictions under Proposition 47. Those requests were granted on May 11, 2015, and November 18, 2015.

On February 8, 2016, defendant filed the Petition. On the form he included the following: "I had 2 prior felonies reduced to misdemeanors (RIF115955 & RIF100013). I request relief from their 2-year 'prison prior' impact on my current sentence (RIF1207791)." On February 16, 2016, the district attorney's office provided a written response, noting that defendant's convictions were for violations of sections 646.9, 422, and 459. The response indicated defendant was not entitled to relief because "Cts 1 & 3 [the violations of sections 646.9 and 422] aren't qualifying sentences." Further, "Ct 4—459 (2nd)—per report, defendant burglarized victim's vehicle (this was a DV case), not a

[4] Defendant requested that we take judicial notice of the two prior convictions including the proceedings reducing the offenses to misdemeanors. We grant the request.

commercial establishment." The trial court denied the Petition finding "422PC & 646.9PC are not qualifying felonies."

DISCUSSION

Defendant was sentenced in 2012. Proposition 47 went into effect in 2014. After the effective date of Proposition 47, and after the sentence was final in this case, defendant successfully petitioned to have two of his prior convictions, which were used as section 667.5, subdivision (b) enhancements in this case, reduced to misdemeanors. Defendant insists on appeal that his sentence in this case must be recalled and the prior convictions can no longer be used to enhance his sentence. We disagree.

Initially, we agree that the trial court failed to state on its written order that it was denying the Petition on the prior convictions. However, "[r]emand is unnecessary if the record is silent concerning whether the trial court misunderstood its sentencing discretion. Error may not be presumed from a silent record. [Citation.] '"[A] trial court is presumed to have been aware of and followed the applicable law."'" (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1229.) It is conceivable the trial court considered Proposition 47 did not apply to the prior convictions and only addressed those convictions for which it could possibly be applicable.

Nonetheless, the issue in this case is a question of statutory construction which is appropriately considered by this court as a question of law. (See *People v. Taylor* (1992) 6 Cal.App.4th 1084, 1090-1091.) This is not a matter that requires an exercise of the trial court's discretion, which would dictate remand. Defendant was not entitled to relief on his prior convictions.

"[O]ur interpretation of a ballot initiative is governed by the same rules that apply in construing a statute enacted by the Legislature. [Citations.] We therefore first look to 'the language of the statute, affording the words their ordinary and usual meaning and viewing them in their statutory context.' [Citations.] Once the electorate's intent has been ascertained, the provisions must be construed to conform to that intent. [Citation.] '[W]e may not properly interpret the measure in a way that the electorate did not contemplate: the voters should get what they enacted, not more and not less.'" (*People v. Park* (2013) 56 Cal.4th 782, 796.)

Several courts have found that Proposition 47 does not apply to enhancements pursuant to section 667.5, subdivision (b) for cases where the judgment imposing the enhancement has become final. (*People v. Jones* (2016) 1 Cal.App.5th 221, review granted September 14, 2016, S235901 (*Jones*); *People v. Acosta* (2016) 247 Cal.App.4th 1072, review granted August 17, 2016, S235773.)[5] We reach the same conclusion.

Proposition 47 provides two ways that a defendant can petition the court for relief. First, "A person currently serving a sentence for a conviction . . . of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section . . . had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case." (§ 1170.18, subd. (a).) If the defendant's felony would have been a misdemeanor, the defendant will be resentenced unless the trial court finds "resentencing the petitioner

[5] These cases can be cited despite review being granted. (Cal. Rules of Court, rules 8.1105, 8.1115)

would pose an unreasonable risk of danger to public safety." (§ 1170.18, subd. (b).) If the defendant has completed his or her sentence, section 1170.18, subdivision (f) provides, "A person who has completed his or her sentence for a conviction . . . of a felony or felonies who would have been guilty of a misdemeanor under this act had this act been in effect at the time of the offense, may file an application before the trial court that entered the judgment of conviction in his or her case to have the felony conviction or convictions designated as misdemeanors." Section 1170.18, subdivision (k), further provides "Any felony conviction that is recalled and resentenced under subdivision (b) or designated as a misdemeanor under subdivision (g) shall be considered a misdemeanor for all purposes," except for ownership of a firearm.

Section 667.5 requires "[e]nhancement of prison terms for new offenses because of prior prison terms." Under subdivision (b), "where the new offense is any felony for which a prison sentence or a sentence of imprisonment in a county jail under subdivision (h) of Section 1170 is imposed or is not suspended, in addition and consecutive to any other sentence therefor, the court shall impose a one-year term for each prior separate prison term or county jail term." (§ 667.5, subd. (b).)

Nothing in the plain language of Proposition 47 provides a remedy for someone who is currently serving a sentence for an "enhancement" and not a "conviction." Section 1170.18 only refers to a conviction and a person who is currently serving a sentence for the conviction. Defendant is not currently serving a sentence on his prior convictions, which were reduced to misdemeanors; he is serving on the enhancements. Nothing in the language of section 1170.18 provides for a procedure to reach back and

resentence on an enhancement when a case is final and the current convictions are ineligible for resentencing.

As found in *Jones, supra,* 1 Cal.App.5th 221, "The focus of these procedures is redesignation of *convictions*, not enhancements. Neither procedure provides for either the recall and resentencing or the redesignation, dismissal, or striking of sentence enhancements. [Citation.] No similar provision provides a process for offenders to seek to strike or otherwise redesignate sentencing enhancements. It follows that nothing in the language of section 1170.18 allows or even contemplates the retroactive redesignation, dismissal, or striking of sentence enhancements imposed in a final judgment entered before Proposition 47 passed, even where the offender succeeds in having the underlying conviction itself deemed a misdemeanor." (*Id.* at pp. 228-229.)

Moreover, nothing in the language of section 1170.18 supports that it is intended to be applied retroactively to enhancements on convictions that do not qualify under Proposition 47 and are final. Section 3 specifies that no part of the Penal Code "is retroactive, unless expressly so declared." "[T]he language of section 3 erects a strong presumption of prospective operation, codifying the principle that, 'in the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature [or electorate] . . . must have intended a retroactive application.' [Citations.] Accordingly, '"a statute that is ambiguous with respect to retroactive application is construed . . . to be unambiguously prospective."'" (*People v. Brown* (2012) 54 Cal.4th 314, 324.)

Section 1170.18 provides no express retroactive provision except as previously delineated regarding reducing a conviction on which a sentence is currently being served. Moreover, section 1170.18, subdivision (k) provides, "Nothing in this and related sections is intended to diminish or abrogate the finality of judgments in any case not falling within the purview of this act." The intent from the language is clear; it was not to disturb final judgments of conviction, which do not fall under Proposition 47.

As cogently held in *Jones, supra*, 1 Cal.App.5th 221, "We assume, without deciding, that subdivision (k) bars a post-Proposition 47 sentencing court from imposing a section 667.5, subdivision (b) enhancement based on a prior felony conviction that has been redesignated as a misdemeanor. It does not follow, however, that subdivision (k) allows the courts to strike prison prior enhancements imposed prior to Proposition 47 based on prior convictions redesignated as misdemeanors after judgment and sentence have become final. The first case involves the *prospective* application of section 1170.18, subdivision (k). The second case, which describes Jones's situation, involves its *retroactive* application. We conclude subdivision (k) does not apply retroactively. [¶] No part of the Penal Code is retroactive, unless it expressly so declares." (*Id.* at p. 229.)

Defendant insists that *People v. Flores* (1979) 92 Cal.App.3d 461 requires that the Petition be granted. In that case, the defendant was convicted in 1977 for the sale of heroin and the sentence was enhanced with a 1966 felony conviction for the sale of marijuana. (*Id.* at pp. 470-471.) However, in 1976, the Legislature had amended the statute by reducing the punishment for the sale of marijuana to a misdemeanor. On direct appeal of the 1977 sale of heroin conviction, the appellate court found the 1976

amendment applied to all new sentences and the enhancement could not be imposed. (*Id*. at pp. 470-474.)

Flores is inapposite to this case. In that case, the issue arose on appeal of the current crimes. Here, defendant's convictions and sentence for second degree burglary, stalking and making criminal threats have long since been final. Proposition 47 was enacted after the finality of the judgment in this case. *Flores* does not authorize the retroactive application that defendant seeks in this case.

Defendant has not shown that Proposition 47 was intended to allow retroactive relief for those who have a conviction that does not qualify for resentencing, but was enhanced by a felony conviction that has since been reduced to a misdemeanor. Defendant is not entitled to relief under Proposition 47. Hence, even though the trial court did not address the issue in the trial court, defendant's Petition was not meritorious under any circumstances.

Defendant contends refusing to grant his Petition on the prior convictions violates his equal protection rights. Specifically, he contends by doing so, this creates two classes of persons: (1) those who are serving sentences on felonies that can now be reduced to misdemeanors; and (2) those who are currently serving sentences under section 667.5, subdivision (b), based on convictions for the same felonies that are now misdemeanors but are not entitled to relief pursuant to Proposition 47. He insists there is no rational basis for depriving those in the second group of relief under Proposition 47.

Both the United States Constitution and the California Constitution guarantee equal protection of the laws. (See *In re Evans* (1996) 49 Cal.App.4th 1263, 1270.) "The

concept of equal treatment under the laws means that persons similarly situated regarding the legitimate purpose of the law should receive like treatment. [Citation.] '"The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner." [Citations.] This initial inquiry is not whether persons are similarly situated for all purposes, but "whether they are similarly situated for purposes of the law challenged."'" (*People v. Morales* (2016) 63 Cal. 4th 399, 408.)

The two groups designated by defendant are not similarly situated for purposes of Proposition 47. Those in the second group, like defendant, are serving their sentences because they are recidivists.

Moreover, it is well settled that "'[a] reduction of sentences only prospectively from the date a new sentencing statute takes effect is not a denial of equal protection.'" (*People v. Floyd* (2003) 31 Cal.4th 179, 189.) "Persons resentenced under Proposition 47 were serving a proper sentence for a crime society had deemed a felony (or a wobbler) when they committed it. Proposition 47 did not have to change that sentence at all. Sentencing changes ameliorating punishment need not be given retroactive effect." (*People v. Morales, supra,* 63 Cal.4th at pp. 408-409.) Defendant was not constitutionally entitled to the benefit of subsequent changes not made retroactive to him based on the fact his sentence was the result of an enhancement and not a conviction. Proposition 47 does not apply to enhancements under section 667.5, subdivision (b) for sentences that were final long before Proposition 47 was enacted and such conclusion does not violate equal protection

DISPOSITION

The denial of defendant's Petition is affirmed.

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MILLER
J.

We concur:

HOLLENHORST
Acting P.J.

SLOUGH
J.